

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT  
PANEL A

IN RE: NEWTON DONALD JENKINS, JR.  
Arkansas Bar ID #94231  
CPC Docket No. 2008-049

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based were developed from information provided to the Committee by Chief United State District Judge Jimm Larry Hendren on April 21, 2008. The information related to the representation of Robert Freeman in 2007-08 by Respondent Newton Donald Jenkins, Jr, an attorney practicing primarily in Alma, Crawford County, Arkansas. On June 23, 2008, Respondent was served with a formal complaint. Respondent failed to file a response to the complaint, which failure to timely respond, pursuant to Section 9.C(4) of the Procedures, constitutes an admission of the factual allegations of the formal complaint and extinguishes Respondent's right to a public hearing.

Mr. Jenkins represented Robert Freeman in a case styled Robert E. Freeman v. Bekaert Corporation and Bekaert Corporation Short Term Disability Plan, No. 07-2111 in the United States District Court, Western District of Arkansas, Fort Smith Division. The Complaint filed on October 9, 2007, had attached to it as Exhibit A the Bekaert Disability Plan handbook, which, on page 1.0, states "Weekly Income Benefits terminate at retirement." It was later admitted that Freeman retired on November 13, 2005 (or 2006). The Complaint did not address or state Freeman's status, as of date of filing, as to whether he was retired or still an active Bekaert employee.

**FILED**

MAR 31 2009

LESLIE W. STEEN  
CLERK

Shawn R. Lillie of Memphis, Tennessee, representing Bekaert, sent Jenkins a letter dated October 26, 2007, stating Freeman had retired from Bekaert on November 13, 2005, and was ineligible for the Plan weekly income benefits he was seeking. Mr. Lillie asked Jenkins to dismiss the Freeman suit then. Lillie next filed Bekaert's Answer on November 7, 2007, and specifically put Plaintiff and Jenkins on notice that Freeman had retired from Bekaert on November 13, 2006, [in other places the year 2005 is used] and was therefore no longer eligible for Plan weekly income benefits claimed in his lawsuit.

Because the matter involved an ERISA claim, Judge Hendren directed the parties to file a stipulated administrative record, followed by briefs. The administrative record in such cases typically contains too much sensitive information -- such as social security numbers -- for redaction to be practical, as a consequence of which the parties are allowed to file it conventionally (i.e., file a paper copy) rather than electronically. Usually the process of obtaining and filing the stipulated record in ERISA cases goes smoothly. The record is obtained by defense counsel from the administrative decision-maker, and submitted to plaintiff's counsel for review. The circumstances under which anything can be added to supplement the record developed at the administrative level are extremely narrow. Thus, filing the stipulated record in an ERISA case is mainly a paper-handling process.

In this case, things did not go smoothly. The stipulated record was not timely filed, and eventually both plaintiff and defendants filed separate stipulated records. The cover sheet to Plaintiff's "Stipulated Record" asserts that the parties "hereby submit this joint stipulated record comprised of the attached exhibits which are true and correct copies of the documents

encompassing the record in this case." It contains the electronic signatures of both Jenkins and Lillie. Defendants' document is entitled "Defendants' Proposed Stipulated Record And Index Of Documents," and it is signed electronically only by Mr. Lillie. It is accompanied by a document entitled "Defendants' Proposed Record And Index Of Documents," which recites that Mr. Jenkins had not "responded to communications initiated by Defendants Counsel for over six weeks regarding Plaintiff's position concerning the submission of the Stipulated Record." While defendants' documents were filed one day after plaintiff's documents, it appears that defendant posted its documents by mail before receiving electronic notice of plaintiff's filing.

Freeman's "Stipulated Record" and Bekaert's "Proposed Stipulated Record" did not contain all the same documents. This problem was brought to the Court's attention by the filing of a Motion To Strike Plaintiff's Stipulated Record by Lillie on February 14, 2008. The motion and accompanying brief made the following allegations: (1) that plaintiff submitted documents in the "Stipulated Record" which defendants had neither seen nor stipulated to; (2) that plaintiff omitted documents from the "Stipulated Record" which were included in the record submitted by Lillie to Jenkins; (3) that plaintiff had signed defense counsel's name to the "Stipulated Record" without having obtained defense counsel's permission to do so; and (4) that plaintiff had failed to serve a copy of the "Stipulated Record" on defense counsel.

Rather than respond to the Motion To Strike, Jenkins moved, on March 6, 2008, to dismiss the case without prejudice (a non-suit). Judge Hendren conducted an unrecorded telephone conference on March 7, 2008, with Jenkins and Lillie to attempt to get to the bottom of Lillie's allegations, which the Judge states he considered very serious -- so serious that it was

quite surprising that Jenkins had not responded to them. Details of the conversation are in the Judge's referral letter dated April 18, 2008.

Under FRCP Rule 11(c)(2), such a sanctions motion as Lillie was prepared to file is served rather than filed on the opposing party, and the opposing party has 21 days to act in accordance therewith before the motion can be filed. This Rule 11 motion was just reaching the 21-day mark when the Motion To Dismiss was filed. It appears that Jenkins' response to both the Motion To Strike and the proposed Rule 11 sanctions motion was simply to move to dismiss the case and, thereby, sweep the matter under the rug. Judge Hendren directed Jenkins to file a written response to the Motion To Strike. In his filed response, Jenkins states that "Plaintiff was aware that his ERISA case for disability benefits was fatally flawed prior to the submission of the administrative record"; that when the record was filed it was his "absolute belief at that time that dismissal of this action was a foregone conclusion"; and that his "lack of attention to detail was caused solely by the belief that this matter was no longer viable once a copy of the Plan Document was available for counsel to review." The Judge states he found this last statement to be highly questionable. Jenkins attached a copy of the Plan Document to the Complaint filed in this case, so he clearly had it available for review from the outset. While Jenkins might not have known when he filed the Complaint that Mr. Freeman had retired and was no longer eligible for disability benefits, he was so informed by Lillie's letter dated October 26, 2007. This information should have put Jenkins on notice that there was a problem with the matter -- and prompted him to get in touch with his client immediately.

While Jenkins states he had trouble getting in touch with his client, the Judge stated he

had difficulty crediting Jenkins' diligence in trying to do so, given that he did not meet with Freeman until January 25, 2008, three months later. At that time, Freeman acknowledged that he had voluntarily retired from Bekaert, apparently before the suit was filed. Rather than dismiss the case promptly, however, Jenkins left Freeman to ponder the matter, advising that if Freeman did not agree to dismiss, Jenkins would withdraw as counsel. The Motion To Dismiss was not filed until March 6, 2008, almost six weeks later.

The differences between the documents in the "Stipulated Record" and the "Proposed Stipulated Record" may be significant. The Judge did not parse the two sets of documents to determine what is included and what is left out, such not being necessary for him to reach his stated conclusions, but it may well be that any omissions or additions would have had bearing on the arguments the parties might have made in the underlying case, if it had not been dismissed on plaintiff's motion.

Upon consideration of the formal complaint and attached exhibit materials, and other matters before it, and the Arkansas Model Rules of Professional Conduct, Panel A of the Arkansas Supreme Court Committee on Professional Conduct finds:

A. Mr. Jenkins' conduct violated Rule 1.3, in that (1) Jenkins was put on notice, from opposing counsel's letter, on or about October 26, 2007, that Jenkins' client had retired from Bekaert Corporation on November 13, 2005 [or possibly 2006], thus terminating his claim for the weekly income benefits that were the subject of his suit, yet Jenkins did not move to dismiss the case until March 6, 2008, an unreasonable delay under the circumstances. (2) Jenkins was put on notice, from opposing counsel's letter, on or about October 26, 2007, that Jenkins' client had

retired from Bekaert Corporation on November 13, 2005 [or possibly 2006], thus terminating his claim for the weekly income benefits that were the subject of his suit, yet Jenkins did not inform his client or discuss this information with his client until January 25, 2008, after Jenkins filed his crucial Plaintiff's Stipulated Record, an unreasonable delay under the circumstances. Arkansas Rule 1.3 requires that a lawyer shall act with reasonable diligence and promptness in representing a client.

B. Mr. Jenkins' conduct violated Rule 3.1 in that (1) Jenkins continued to maintain a frivolous proceeding on behalf of Robert Freeman after October 26, 2007, when opposing counsel notified Jenkins in writing that Freeman had retired from Bekaert Corporation on November 13, 2005 [or possibly 2006], and therefore was thereafter ineligible for continued payment of weekly income benefits under the Bekaert Short Term Disability Plan. Freeman's retirement was the dispositive issue of Plaintiff's suit. Jenkins finally informed Freeman of this fact on January 25, 2008. Jenkins maintained Freeman's suit until he filed a motion to dismiss on March 6, 2008. (2) Mr. Jenkins continued to maintain a frivolous proceeding on behalf of Robert Freeman after November 7, 2007, when opposing counsel informed Jenkins in the Answer filed that date for Bekaert Corporation that Freeman had retired from Bekaert Corporation on November 13, 2006 [possibly 2005], and therefore was thereafter ineligible for continued payment of weekly income benefits under the Bekaert Short Term Disability Plan. Freeman's retirement was the dispositive issue of Plaintiff's suit. Jenkins finally informed Freeman of this fact on January 25, 2008. Jenkins maintained Freeman's suit until he filed a motion to dismiss on March 6, 2008. Arkansas Rule 3.1 requires that a lawyer shall not bring or defend a proceeding,

or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

C. Mr. Jenkins' conduct violated Rule 3.2 in that Jenkins was put on notice, by opposing counsel's letter, on or about October 26, 2007, that Jenkins' client had retired from Bekaert Corporation on November 13, 2005 [possibly 2006], thus terminating his claim for the weekly income benefits that were the subject of his suit, yet Jenkins did not move to dismiss the case until March 6, 2008, an unreasonable delay under the circumstances. Arkansas Rule 3.2 requires that a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

D. Mr. Jenkins' conduct violated Rule 3.3(a)(1) in that by its title, Arkansas Rule 3.3 requires "candor toward the tribunal." Rule 3.3(a)(1) requires that a lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. On January 23, 2008, Jenkins filed his client's Stipulated Record, stating that opposing counsel joined in the stipulation, when opposing counsel had not so stipulated and had not even seen the document before it was filed. On February 14, 2008, opposing counsel filed a motion to strike Jenkins' Stipulated Record, accusing him of falsification of the Stipulated Record and other misconduct that called for an immediate response from Jenkins to opposing counsel and the Court. Instead of addressing and

correcting the false statements of material fact he had made in his Stipulated Record, on March 6, 2008, Jenkins filed a motion to dismiss, [Exhibit D, Docket Item 11], for the purpose of avoiding having to address the issues of alleged misconduct raised in opposing counsel's motion to strike.

Arkansas Rule 3.3(a) requires that a lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

E. Mr. Jenkins' conduct violated Rule 3.4(b) in that, to the extent that Jenkins' Stipulated Record filed for Mr. Freeman on January 23, 2008, in 07-CV-2111 differs from documents supplied by Jenkins to opposing counsel Lillie, such differences are a knowing falsification by Jenkins, and in violation of the Court's Administrative Record Scheduling Letter issued November 7, 2007, which required the filing of one record stipulated to by counsel for both parties. In his Motion to Strike Plaintiff's Stipulated Record and Brief opposing counsel Lillie states he had never seen some of the documents included in Jenkins' Stipulated Record. Arkansas Rule 3.4(b) requires that a lawyer shall not falsify evidence, counsel or assist a witness



to testify falsely, or offer an inducement to a witness that is prohibited by law.

F. Mr. Jenkins' conduct violated Rule 8.4(c) in that (1) without permission from or the knowledge of Mr. Lillie, Jenkins signed the electronic signature of opposing counsel, Shawn Lillie, to Plaintiff's Stipulated Record filed January 23, 2008, in 07-CV-2111, and submitted same to the Court as a joint stipulation between the parties, conduct by Mr. Jenkins involving dishonesty, fraud, deceit or misrepresentation on Mr. Lillie and the Court. (2) After Mr. Lillie wrote Mr. Jenkins on February 14, 2008, demanding that Jenkins correct the misstatement that Jenkins' Stipulated Record was a "joint stipulation" approved by Mr. Lillie, Mr. Jenkins attempted to avoid having to deal with the issue before the Court by filing a motion for voluntary dismissal on March 6, 2008. (3) The Bekaert Short Term Disability Plan clearly states that weekly income benefits at issue in this case terminate at retirement. Mr. Jenkins knew his client Freeman had retired from Bekaert effective November 13, 2005 [possibly 2006]. Mr. Lillie so notified Jenkins by letters dated October 26 and December 5, 2007. In his Response to defendant's Motion to Strike, Jenkins acknowledged receiving Lillie's December 5, 2007, letter. Thereafter, on January 23, 2008, Jenkins intentionally failed to submit documentation of his client's retirement status in his Stipulated Record, knowing that to have included such documentation would have effectively ended his client's case, conduct involving dishonesty, fraud, deceit or misrepresentation by Jenkins. Arkansas Rule 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

G. Mr. Jenkins' conduct violated Rule 8.4(d) in that (1) by knowingly submitting and

filing on January 23, 2008, a Plaintiff's Stipulated Record that had not been seen, much less agreed to and stipulated to by opposing counsel in 07-CV-2111, Jenkins engage in conduct that was prejudicial to the administration of justice. (2) By failing to timely withdraw his Plaintiff's Stipulated Record after opposing counsel on February 14, 2008, sent Jenkins a letter and a copy of a proposed Motion for Sanctions under FRCP 11 against him, Jenkins engaged in conduct that was prejudicial to the administration of justice, and required the time of the Court and a telephone conference on March 7, 2008, among the Court and both counsel to resolve issues. Thereafter, on March 18, 2008, Jenkins finally filed a response to the motion to strike. On April 16, 2008, the Court granted Jenkins' motion to dismiss. Arkansas Rule 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel A, that the Arkansas law license of **NEWTON DONALD JENKINS, JR.**, Arkansas Bar ID# 94231, be, and hereby is, **SUSPENDED FOR THREE (3) MONTHS** for his conduct in this matter, and he is assessed \$50.00 standard Committee case costs. For failing to file a response to the Complaint, Respondent is separately **REPRIMANDED** and fined \$500.00. The suspension shall become effective on the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court. The fine and costs assessed herein shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct with thirty (30) days of the date this Findings and Order is filed of record with the Clerk

of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE  
ON PROFESSIONAL CONDUCT - PANEL A

By: Steven Shults  
Steven Shults, Chair, Panel A

Date: September 29, 2008

(Rev. 3-18-06 SL)